

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GUADALUPE HERNANDEZ, } Case No. CV-06-2722 JC

Plaintiff, } MEMORANDUM OPINION AND

v. } ORDER OF REMAND

MICHAEL J. ASTRUE,<sup>1</sup>  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant. }

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**I. PROCEEDINGS**

On May 5, 2006, plaintiff Guadalupe Hernandez (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of benefits. The parties have filed a consent to proceed before a United States Magistrate Judge.

This matter is before the court on the parties cross-motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”).<sup>2</sup> The court has taken both motions under submission without oral argument. See Fed.

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<sup>1</sup>Michael J. Astrue is substituted as Commissioner of Social Security pursuant to F.R. Civ. Proc. 25(d)(1).

<sup>2</sup>Plaintiff’s Motion was filed on September 8, 2006. Defendant’s Motion was filed on October 6, 2006.

1 R. Civ. P. 78; L.R. 7-15; May 16, 2006 Case Management Order, ¶ 5.

2 Based on the record as a whole and the applicable law, the decision of the  
3 Commissioner is REVERSED AND REMANDED for further proceedings  
4 consistent with this Memorandum Opinion and Order of Remand. The decision of  
5 the Administrative law Judge (“ALJ”) that plaintiff could perform her past  
6 relevant work is not supported by substantial evidence.

7 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE  
8 DECISION**

9 On October 4, 2002, plaintiff applied for disability insurance benefits and  
10 supplemental security income. (Administrative Record (“AR”) 17, 91-93).  
11 Plaintiff asserted that she became disabled beginning on May 1, 2001, due to loss  
12 of memory, inability to concentrate, depression, nervousness and arthritis. (AR  
13 91, 97). The Social Security Administration denied plaintiff’s application initially  
14 and upon reconsideration. (AR 74-80). On April 21, 2004 and April 5, 2005, the  
15 ALJ held hearings in this matter. (AR 279-306). The ALJ examined the medical  
16 record and heard testimony from plaintiff (who was represented by counsel) and a  
17 vocational expert. *Id.*

18 On November 21, 2005, the ALJ found, inter alia, that plaintiff was not  
19 disabled. (AR 17-23). Specifically, the ALJ found: (1) plaintiff suffered from the  
20 following severe impairments: low back problems, depressive disorder (not  
21 otherwise specified) and borderline range intellectual functioning (AR 18);  
22 (2) plaintiff’s impairments taken either singly or in combination, did not meet or  
23 medically equal one of the listed impairments (AR 19); (3) plaintiff retained the  
24 residual functional capacity to: (a) perform medium exertional work activities;  
25 (b) none to slight limitations in plaintiff’s ability to understand, remember and  
26 carry out short and simple instructions; (c) slight limitations in plaintiff’s ability to  
27 interact appropriately with the public, supervisors and co-workers; and  
28 (d) moderate limitations in plaintiff’s ability to understand, remember and carry

1 out complex instructions, in her ability to make judgments on simple work-related  
2 decisions, and in her ability to respond appropriately to work pressures and  
3 changes in a routine work setting (AR 21); and (4) plaintiff could perform her past  
4 relevant work as a housekeeper, as performed by her. (AR 22).

5 The Appeals Council denied plaintiff's application for review of the ALJ's  
6 decision. (AR 5-8, 12).

### 7 **III. DISCUSSION**

#### 8 **A. Sequential Evaluation Process**

9 To qualify for disability benefits, a claimant must show that she is unable to  
10 engage in any substantial gainful activity by reason of a medically determinable  
11 physical or mental impairment which can be expected to result in death or which  
12 has lasted or can be expected to last for a continuous period of at least twelve  
13 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.  
14 § 423(d)(1)(A)). The impairment must render the claimant incapable of  
15 performing the work she previously performed and incapable of performing any  
16 other substantial gainful employment that exists in the national economy. Tackett  
17 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

18 In assessing whether a claimant is disabled, an ALJ is to follow a five-step  
19 sequential evaluation process:

- 20 (1) Is the claimant presently engaged in substantial gainful activity? If  
21 so, the claimant is not disabled. If not, proceed to step two.
- 22 (2) Is the claimant's alleged impairment sufficiently severe to limit  
23 her ability to work? If not, the claimant is not disabled. If so,  
24 proceed to step three.
- 25 (3) Does the claimant's impairment, or combination of  
26 impairments, meet or equal an impairment listed in 20 C.F.R.  
27 Part 404, Subpart P, Appendix 1? If so, the claimant is  
28 disabled. If not, proceed to step four.

- 1 (4) Does the claimant possess the residual functional capacity to
- 2 perform her past relevant work? If so, the claimant is not
- 3 disabled. If not, proceed to step five.
- 4 (5) Does the claimant's residual functional capacity, when
- 5 considered with the claimant's age, education, and work
- 6 experience, allow her to adjust to other work that exists in
- 7 significant numbers in the national economy? If so, the
- 8 claimant is not disabled. If not, the claimant is disabled.

9 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th  
10 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

11 The ALJ has an affirmative duty to assist the claimant in developing the  
12 record at every step of the inquiry. Bustamante v. Massanari, 262 F.3d 949, 954  
13 (9th Cir. 2001); see also Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005)  
14 (ALJ has special duty to fully and fairly develop record and to assure that  
15 claimant's interests are considered). The claimant has the burden of proof at steps  
16 one through four, and the Commissioner has the burden of proof at step five.  
17 Bustamante, 262 F.3d at 953-54 (citing Tackett); see also Burch, 400 F.3d at 679  
18 (claimant carries initial burden of proving disability). If, at step four, the claimant  
19 meets her burden of establishing an inability to perform past work, the  
20 Commissioner must show, at step five, that the claimant can perform some other  
21 work that exists in "significant numbers" in the national economy, taking into  
22 account the claimant's residual functional capacity, age, education, and work  
23 experience. Tackett, 180 F.3d at 1100 (citing 20 C.F.R. § 404.1560(b)(3)).

24 **B. Standard of Review**

25 Pursuant to 42 U.S.C. section 405(g), a court "may set aside a denial of  
26 benefits only if it is not supported by substantial evidence or if it is based on legal  
27 error." Robbins v. Social Security Administration, 466 F.3d at 882 (citing Flaten  
28 v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)).

1 Substantial evidence is “such relevant evidence as a reasonable mind might accept  
 2 as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401  
 3 (1971) (citations and quotations omitted). It is more than a mere scintilla but less  
 4 than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911  
 5 F.2d 180, 183 (9th Cir. 1990)).

6 To determine whether substantial evidence supports a finding, a court must  
 7 “consider the record as a whole, weighing both evidence that supports and  
 8 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.  
 9 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d  
 10 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming  
 11 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that  
 12 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

13 **C. Substantial Evidence Does Not Support the ALJ’s Decision that  
 14 Plaintiff Could Perform Her Past Relevant Work**

15 Plaintiff argues, inter alia, that the ALJ allegedly erred in determining that  
 16 plaintiff could perform her past relevant work as a housekeeper. (Plaintiff’s  
 17 Motion at 7-8). As the ALJ in this case (i) materially mischaracterized the  
 18 testimony of the vocational expert upon which he apparently relied in concluding  
 19 that plaintiff could perform her past relevant work as performed by her; and  
 20 (ii) failed to make any findings as to the mental demands of plaintiff’s past job,  
 21 remand is appropriate. See Regennitter v. Commissioner, 166 F.3d 1294, 1297  
 22 (9th Cir. 1999) (when administrative decision rests on “inaccurate characterization  
 23 of the evidence,” remand warranted).

24 The Administration may deny benefits when the claimant can perform the  
 25 claimant’s past relevant work as “actually performed,” or as “generally”  
 26 performed. Pinto v. Massanari, 249 F.3d 840, 845 (9th Cir. 2001). Although the  
 27 claimant has the burden of proving an inability to perform her past relevant work,  
 28 “the ALJ still has a duty to make the requisite factual findings to support his

1 conclusion.” Id. at 844. “To determine whether a claimant has the residual  
2 capacity to perform [her] past relevant work, the [Administration] must ascertain  
3 the demands of the claimant’s former work and then compare the demands with  
4 [her] present capacity.” Villa v. Heckler, 797 F.2d 794, 797-98 (9th Cir. 1986). In  
5 finding that an individual has the capacity to perform a past relevant job, the  
6 determination or decision must contain the following specific findings of fact:  
7 (1) a finding of fact as to the individual’s residual functional capacity; (2) a  
8 finding of fact as to the physical and mental demands of the past job/occupation;  
9 and (3) a finding of fact that the individual’s residual functional capacity would  
10 permit a return to her past job or occupation. SSR 82-62; See Dealmeida v.  
11 Bowen, 699 F. Supp. 806, 807 (N.D. Cal. 1988). In making these findings, the  
12 ALJ must conduct a searching inquiry and analysis. The decision as to whether  
13 the claimant retains the functional capacity to perform past work which has current  
14 relevance has far-reaching implications and must be developed and explained fully  
15 in the disability decision. Since this is an important and, in some instances, a  
16 controlling issue, every effort must be made to secure evidence that resolves the  
17 issue as clearly and explicitly as circumstances permit. Reasonable inferences may  
18 be drawn, but presumptions, speculations and suppositions must not be used. SSR  
19 82-62.

20 Here, the ALJ found that plaintiff’s past relevant work as housekeeper, as  
21 performed by plaintiff (i.e., as “actually” performed), did not involve performance  
22 beyond her residual functional capacity. (AR 22). The ALJ’s determination is  
23 based upon a material mischaracterization of the record and is not supported by  
24 adequate findings or substantial evidence.

25 First, in discussing whether plaintiff could perform her past job, the ALJ  
26 materially mischaracterized the testimony of the vocational expert upon whom he  
27 apparently relied. Specifically, the ALJ noted:  
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1       The impartial vocational expert testified that based upon the  
 2       claimant's residual functional capacity, the claimant could return to  
 3       her past relevant work as housekeeper as previously performed. . . .<sup>3</sup>

4 (AR 22) (citing 20 C.F.R. §§ 404.1520(f) and 416.920(f)). The record does not  
 5 support the ALJ's finding. The entirety of the vocational expert testimony is as  
 6 follows:

7       Q: Having reviewed the claimants (sic) vocational history and  
 8       hearing the testimony please identify the work performed by  
 9       the claimant in the past 15 years, identify the job that she's  
 10      entitled DOT number, skill and [inaudible] level of each job?

11      A: He (sic) housekeeping work would come under the title of Day  
 12      Worker, DOT number 301.687-014(,) it's a medium exertion  
 13      level, her description file was light and its (sic) unskilled with  
 14      an SBP (sic) of 2.

15 (AR 296; see also AR 97-98 (plaintiff's description of her job duties)). Contrary  
 16 to the ALJ's statement, the vocational expert did not testify that plaintiff could  
 17 return to her past relevant work.

18       Second, the ALJ made no specific findings as to the mental demands of  
 19 plaintiff's past job as required. As discussed above, the ALJ found that plaintiff's  
 20 residual functional capacity was limited by moderate difficulties in her ability to  
 21 understand, remember and carry out complex instructions and to make judgments  
 22 on simple work-related decisions. (AR 20-21, adopting consultative evaluation at

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24      <sup>3</sup>Although the ALJ also erroneously indicated that the vocational expert testified that  
 25 plaintiff could return to her past work as housekeeper as "generally" performed in the national  
 26 economy, and noted that the pertinent social security regulations and rulings provide that an  
 27 individual will be found "not disabled" when it is determined that she retains the residual  
 28 functional capacity to perform either the actual functional demands and job duties of a particular  
 past relevant job, or the functional demands and job duties of the occupation as generally  
 required by employers throughout the national economy, the ALJ did not make a finding that  
 plaintiff could return to her past work as housekeeper as "generally" performed. (AR 22).

1 AR 260 (noting plaintiff “may have significant difficulty performing detailed,  
2 varied, and complex tasks”), 262-64). As the ALJ made no findings of fact  
3 regarding the mental demands of plaintiff’s prior job, his determination that she  
4 could perform her prior job is unsupported in this respect. At a minimum, the ALJ  
5 should have asked plaintiff about the mental demands of her former work as  
6 performed to determine whether plaintiff could perform her past relevant work.  
7 See SSR 82-61, 82-41 (providing that a properly completed vocational report or  
8 plaintiff’s own testimony can provide a basis for determining the prior demands of  
9 a claimant’s past relevant work as performed); see also AR 97-98 (plaintiff’s  
10 “Disability Report Adult” noting that she is limited in her ability to work by her  
11 inability to concentrate and nervousness but not discussing the mental demands of  
12 her former job).

13 As the ALJ’s determination that plaintiff could perform her past job as  
14 actually performed is based upon a material mischaracterization of  
15 the record and is not supported by adequate findings or substantial evidence,  
16 remand is appropriate.

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## IV. CONCLUSION<sup>4</sup>

For the foregoing reasons, the decision of the Commissioner of Social Security is reversed in part, and this matter is remanded for further administrative action consistent with this Opinion.<sup>5</sup>

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 13, 2007

/s/

Honorable Jacqueline Chooljian  
UNITED STATES MAGISTRATE JUDGE

<sup>4</sup>The court need not, and has not adjudicated plaintiff's other challenges to the ALJ's decision, except insofar as to determine that a reversal and remand for immediate payment of benefits would not be appropriate.

<sup>5</sup>When a court reverses an administrative determination, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and quotations omitted). Remand is proper where, as here, additional administrative proceedings could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989); see also Connell v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) (remand is an option where the ALJ stated invalid reasons for rejecting a claimant’s excess pain testimony).